No. 94-562

In The

Supreme Court of the United States

October Term, 1994

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A REPRESENTATIVE OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE ORION INSURANCE COMPANY, PLC, SKANDIA U.K. INSURANCE PLC, THE YASUDA FIRE & MARINE INSURANCE COMPANY OF EUROPE, LTD., OCEAN MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE CO., LTD., MINSTER INSURANCE CO., LTD., PRUDENTIAL ASSURANCE CO., LTD., PEARL ASSURANCE PLC, BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO. (UK) LTD., VESTA (UK) INS. CO., LTD., NORTHERN ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD., SIRIUS INSURANCE CO., (UK) LTD., SOVEREIGN MARINE & GENERAL INSURANCE CO., TOKIO MARINE & FIRE INSURANCE (UK) LTD., TAISHO MARINE & FIRE INSURANCE CO. (UK) LTD., STOREBRAND INSURANCE CO. (UK) LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ INTERNATIONAL INSURANCE CO., LTD., AND WAUSAU INSURANCE CO. (UK) LTD.,

Petitioners,

v.

SEVEN FALLS COMPANY, MARGARET HUNT HILL, ESTATE OF A.G. HILL, LYDA HILL, ALINDA H. WIKERT, AND U.S. FINANCIAL CORP.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Does the "exceptional circumstances" test apply to a federal district court's determination of whether to abstain from exercising its jurisdiction in a declaratory judgment action?

II. Even if the "exceptional circumstances" test applies, was the district court's stay order proper?

III. Under either a *de novo* or an abuse of discretion standard, was the district court's stay order proper?

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BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny Petitioners' request for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 29, 1994.

STATEMENT OF THE CASE

Petitioners' statement of the case is misleading. For this reason, Respondents submit the following.

This is an insurance coverage dispute arising out of three underlying lawsuits, two of which were consolidated in the district court of Winkler County, Texas. The third lawsuit is pending in a district court in Dallas County, Texas. (R II p. 119.) Each of the underlying lawsuits involves a dispute over the ownership and/or operation of certain oil and gas properties located in Winkler County, Texas. (R III p. 3.) In late September, 1992, the consolidated Winkler County suits proceeded to trial. After a three week trial, a verdict in excess of $100 million was rendered against the Respondents and others. (R II pp. 118-19.)

Petitioners were given notice of this verdict by counsel for Respondents in November, 1992. (R II pp. 145-47, 150 at ¶ 2.) On December 9, 1993, before judgment was even rendered on the Winkler County verdict and despite the fact that Petitioners had previously denied coverage to Respondents for the Winkler County litigation, Petitioners, anticipating litigation from Respondents and desiring to shop for the most advantageous forum, instituted Civil Action No. H-92-3749, a suit identical to this

one, in the United States District Court for the Southern District of Texas. (R I pp. 261-63; R II p. 118.) That suit was dismissed without prejudice pursuant to an agreement of counsel. (R II pp. 118, 139-44, 150 at ¶ 3.)

Counsel for Respondents obtained Petitioners' agreement to dismiss their original declaratory judgment action in order to avoid the possibility that the mere existence of Petitioners' declaratory judgment action might jeopardize ongoing negotiations between Respondents and certain of their other insurers regarding the underlying Winkler County litigation.[1] (R III pp. 3-4.) In exchange for procuring Petitioners' voluntary dismissal of their original declaratory judgment action, Respondents agreed to give Petitioners fourteen days advance notice prior to instituting litigation against Petitioners in order that Petitioners might retain their perceived advantage in having the first suit on file. (R II p. 141 ¶ 1.)

On February 12, 1993, the Winkler County District Court entered a judgment on the jury's verdict. Shortly thereafter, on February 17, 1993, Petitioners' other insurers instituted a declaratory judgment action against

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[1] Respondents maintained insurance coverage with these other insurers in the amount of at least $100 million. (R III p. 3.) The insurance coverage at issue in this action, while substantial in amount, would not have been sufficient to supersede the Winkler County Judgment. (R III p. 19.) Thus, while it is true that dealings with Respondents' other insurers were of paramount importance in attempting to supersede the Winkler County judgment, at no time did Respondents' counsel represent that Respondents would never bring an action against Petitioners. The fourteen day notice provision in the parties' letter agreement clearly evidences this fact. (R II p. 141 ¶ 1.)

Respondents. That action was styled *Ronald Malcolm Pateman, et al. v. Margaret Hunt Hill, et al.*, Cause No. 93-1658 and was filed in the 298th Judicial District Court in Dallas County, Texas. (R III pp. 4-5.) In light of the fact that Respondents' negotiations with their other insurers had fallen through and become the subject of litigation, Respondents saw no point in further postponing resolution of all of their insurance coverage questions with all of their insurers. Accordingly, on February 23, 1993, Respondents notified Petitioners of their intention to file suit in state court. Petitioners refiled this declaratory judgment action in the United States District Court for the Southern District of Texas that same day.

On March 26, 1993, Respondents filed an action against Petitioners in Texas state court (the "state court action").[2] That same day, Respondents filed their Rule 12 Motion to Dismiss or Stay in this case, requesting that this action be dismissed or stayed in deference to the state court action. On June 30, 1993, the district court granted Respondents' Rule 12 Motion, staying this action pending resolution of the state court action. In its order staying this action, the district court found that: (1) Petitioners filed their original declaratory judgment action in anticipation of litigation by Respondents; (2) the action was filed as a means of forum shopping; (3) Petitioners' rights would adequately be protected in the state court

[2] The state court action also names as plaintiffs various members of the Hunt family and their related entities (the "Hunt Group") who are also judgment debtors in the Winkler County litigation. The Hunt Group is likewise asserting claims for coverage and for bad faith against its insurers, Underwriters Indemnity Company and Planet Indemnity Company.

action in that Petitioners could assert their claims in this action as defenses or counterclaims in the state court proceeding; (4) exercising jurisdiction in this case would result in piecemeal litigation; and (5) it would be inequitable to allow Petitioners to gain precedence in the choice of forum. *See* Appendix B to Petitioners' Petition for a Writ of Certiorari at p. B-3. This ruling, which was affirmed by the Fifth Circuit Court of Appeals, is the subject of Petitioners' petition to this Court.

SUMMARY OF ARGUMENT

The judicially-formed "exceptional circumstances" test, which normally governs the determination of whether it is proper for a federal court to abstain from exercising its jurisdiction in a particular case, does not apply to declaratory judgment actions. Concerns that federal courts have a virtually unflagging obligation to exercise jurisdiction are irrelevant because Congress created the Declaratory Judgment Act and specifically gave the courts discretion concerning whether to hear declaratory judgment actions. Indeed, this Court, in *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942), has already determined that a court should not ordinarily exercise its discretion to hear a declaratory judgment action where there is another suit between the parties pending in state court that presents the same issues not governed by federal law.

This Court's rationale in *Brillhart* for allowing district courts broad discretion in determining whether to exercise jurisdiction in a declaratory judgment action had

three principal bases: (1) avoidance of having federal courts needlessly determine issues of state law; (2) discouraging litigants from filing declaratory judgment actions as a means of forum shopping; and (3) avoiding duplicative litigation. Each of these factors support abstention here. First, there is no dispute that this insurance coverage dispute is governed by state law. Second, the courts below correctly concluded that Petitioners brought this action in anticipation of litigation and that entertaining jurisdiction over this declaratory judgment action would reward Petitioners' attempts to forum shop. Third, the courts below properly recognized that declining the exercise of jurisdiction in this case would avoid duplicative litigation. Thus, under both the holding and rationale of this Court's decision in *Brillhart*, the district court's decision to abstain from exercising its jurisdiction was entirely proper.

Even if the "exceptional circumstances" test set forth in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 97 S. Ct. 1236, 47 L. Ed. 2d 483 (1976) and *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) were applicable to a district court's determination of whether to exercise jurisdiction in a declaratory judgment action, the trial court properly refused to exercise jurisdiction in this case. The *Colorado River/Moses H. Cone* factors themselves run substantially parallel to the criteria that have been deemed relevant to a court's determination of whether to accept or decline jurisdiction in a declaratory judgment action, and, as applied in this case, support abstention. Significantly, Petitioners, while complaining of the Fifth Circuit's failure to apply the *Colorado*

River/Moses H. Cone factors, simply have not shown that a contrary result would have been reached had such factors been applied.

Finally, regardless of the standard of review applied – *de novo* or abuse of discretion – either standard would have yielded the same result in this case. Even so, all of the factors relating to the allowance of broad discretion to the district court in determining whether to entertain a declaratory judgment action support an abuse of discretion standard. The standard is consistent with not only the Declaratory Judgment Act, but common sense. The district courts, in fulfilling whatever obligation they may have to exercise jurisdiction, should not be deprived of the discretion to decline jurisdiction over a declaratory judgment action where, as here, the declaratory judgment action is instituted as a means of forum shopping, no issue of federal law is presented, and maintenance of two parallel suits would result in duplicative litigation.

ARGUMENT

The decision of the Fifth Circuit Court of Appeals is correct in affirming the district court's stay of this action pending determination of the parallel state court proceeding. Further, there is no conflict between the decision of the Fifth Circuit and cases previously decided by this Court. Thus, there is no basis for review of this case by this Court.

I. The Declaratory Judgment Act Does Not Obligate A District Court To Exercise Its Jurisdiction In A Declaratory Judgment Action.

The unique nature of declaratory judgment actions forms the basis for the departure from the general rule disfavoring abstention. *See* 17A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4247 at 118-20 (2nd ed. 1988) (noting the special nature of a declaratory judgment as supporting abstention in a declaratory judgment action). Generally, abstention is disfavored and "exceptional circumstances" are required before abstention is proper. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *see also Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1 (1983). When an action is one for declaratory judgment, however, the district court has broad discretion to defer to a similar state action.

Declaratory relief, both by its nature and under the plain language of the Declaratory Judgment Act, 28 U.S.C. § 2201 (1982), is discretionary. *Public Affairs Assoc., Inc. v. Rickover*, 369 U.S. 111, 112 (1962) (per curiam). The Declaratory Judgment Act is an authorization, not a command. It gives federal courts competence to make a declaration of rights; it does not impose a duty to do so. *Id.*; *see also* Edwin Borchard, *Declaratory Judgments* at 231-41 (2nd ed. 1941). Congress appears explicitly to have authorized the exercise of discretion by using the word "may" in the Declaratory Judgment Act, 28 U.S.C. § 2201 (1982). David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U.L. Rev. 543, 548 n. 24 (1985) (discussing "traditional" equitable discretion not to proceed). The way to guarantee that district courts retain the discretion afforded under the

Act is through analysis under the Act. *Terra Nova Ins. Co. v. 900 Bar, Inc.*, 887 F.2d 1213, 1223 (3rd Cir. 1989).

The legislative history of the Declaratory Judgment Act itself shows that "large discretion is conferred upon the courts as to whether or not they will administer justice by the procedure." *See* H.R. Rep. No. 1264, 73rd Cong., 2nd Sess., at 2 (1934).[3] A district court is under no requirement to hear a declaratory judgment action before it can exercise its discretion to decline to enter the requested relief. The duty of a court to exercise its jurisdiction is not automatic or obligatory. *Brillhart*, 316 U.S. at 491; Edwin Borchard, *Declaratory Judgments* 312-13 (2nd ed. 1941); 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2759 at 644 (1983) (noting that the draftsmen of the Act rejected the view that the terms of Act were mandatory and did not leave any discretion in the court to refuse jurisdiction).

The Declaratory Judgment Act is uncommon in that it neither imposes an unflagging duty upon the courts to decide declaratory judgment actions nor grants entitlement to litigants to demand declaratory remedies. *See Green v. Mansour*, 474 U.S. 64, 72 (1985). In declaratory

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[3] Petitioners' representation of the content of the legislative history is incorrect. Petitioners claim that the legislative history of the act "makes it clear that the courts have no discretion to decline to hear a declaratory judgment action, but *must* allow the litigants an opportunity to be heard." (Petition at p. 14). Nowhere in the reports cited by Petitioners is there any such implied, much less, explicit requirement. The report says the opposite, *See* H.R. Rep. No. 1264, 73rd Cong., 2nd Sess., at 2 (1934). Even so, *Brillhart* puts this issue to rest. *Brillhart*, 316 U.S. at 494.

judgment actions, the courts are under no compulsion to exercise their jurisdiction and ultimately, the decision whether to defer to the concurrent jurisdiction of a state court is a matter committed to the district court's discretion. *Brillhart*, 316 U.S. at 494. Thus, a federal court's obligation to decide virtually all questions within its jurisdiction is curtailed when complainants seek declaratory relief. *See generally* Edwin Borchard, *Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments*, 26 Minn. L. Rev. 677 (1942).

In addition, the reason that the "exceptional circumstances" test does not apply to declaratory judgment actions arises from the genesis of *Colorado River* and *Moses H. Cone*, as opposed to the origin of the Declaratory Judgment Act. This Court's holdings in *Colorado River* and *Moses H. Cone* were designed to impose restrictions on the discretion of lower courts to abstain from exercising their jurisdiction on inappropriate grounds in cases not involving requests for relief under the Declaratory Judgment Act. *U.S. Fidelity & Guar. v. Algernon-Blair, Inc.*, 705 F. Supp. 1507, 1521 (M.D. Ala. 1988). Such a policy concern does not exist in the context of a declaratory judgment action. In contrast, a district court's discretion over declaratory judgment actions originates in Congress, which has authority to design such statutory relief. Congress gave the court discretion in determining whether to exercise its authority. *Id.*; *Brillhart*, 316 U.S. at 494; 28 U.S.C. § 2201; Shapiro, *Jurisdiction and Discretion*, *supra*, at 548 n. 24. Thus, the exceptional circumstances test does not apply to declaratory judgment actions, because the concerns that prompted articulation of that test (e.g., that the federal courts have a "virtually unflagging obligation

to exercise the jurisdiction given to them," *Colorado River*, 424 U.S. at 817), are irrelevant in an action for declaratory relief under 28 U.S.C. § 2201, where the court is under no compulsion to exercise its jurisdiction. *Terra Nova*, 887 F.2d at 1222.

Nor do Petitioners' citations to this Court's recent decisions in *McCarthy v. Madigan*, ___ U.S. ___, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992) and *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989) compel a different result. Petitioners cite *McCarthy* and *New Orleans* as authority for the proposition that a district court is obligated to exercise its jurisdiction in a declaratory judgment case absent the existence of the requisite *Colorado River/Moses H. Cone* exceptional circumstances. (Petition at pp. 14-15.) Neither case supports this proposition. The *McCarthy* case does not support Petitioners' position in that it is not a declaratory judgment action and it does not even discuss the issue of whether a district court has discretion to exercise its jurisdiction in such a case. Petitioners' reliance on *New Orleans* is likewise misplaced since that case (1) involves abstention under the *Burford* and *Younger* doctrines,[4] which doctrines have no applicability to this case, and (2) likewise does not address the issue of whether the *Colorado River/Moses H. Cone* exceptional circumstances test applies to an action brought under the Declaratory Judgment Act. Thus, contrary to Petitioners' position, this Court has not determined that the *Colorado River/Moses H.*

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[4] *See, Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943); *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 669 (1971).

Cone exceptional circumstances test governs the abstention determination in a declaratory judgment action. On the contrary, this Court has recognized, on more than one occasion, that the exercise of jurisdiction over a declaratory judgment action is a matter committed to the district court's discretion. *Brillhart*, 316 U.S. at 494; *Rickover*, 369 U.S. at 112. The Fifth Circuit's opinion in this case is wholly consistent with this Court's prior rulings on this issue. Accordingly, there is no basis for review of this case by this Court.

II. Even If The *Colorado River* And *Moses H. Cone* Factors Apply, The Trial Court Properly Addressed Those Factors In Refusing To Exercise Its Jurisdiction.

Petitioners argue that the Fifth Circuit should have applied the factors set forth in *Colorado River* and *Moses H. Cone* to determine whether the stay was proper. As set forth above, these factors have no applicability to an action brought under the Declaratory Judgment Act. Even if the *Colorado River* and *Moses H. Cone* factors were applied in this case, however, the district court properly determined to refuse to exercise jurisdiction. Significantly, Petitioners do not even attempt to illustrate that a contrary result would have been reached had these factors been applied. For these additional reasons, this case is not appropriate for consideration by this Court.

Under *Colorado River* and *Moses H. Cone*, the following factors are to be considered in determining whether to abstain from hearing a case due to the pendency of a similar state court action:

(1) the avoidance of exercise of jurisdiction over particular property by more than one court;

(2) the inconvenience of the federal forum;

(3) the desirability of avoiding piecemeal litigation;

(4) the order in which jurisdiction was obtained by the concurrent forums;

(5) the applicability of federal or state law to the merits of the claims at issue; and

(6) the adequacy of state court proceedings to protect the rights of the party that invoked the federal court's jurisdiction.

Moses H. Cone, 460 U.S. at 15-16; *Colorado River*, 424 U.S. at 818-19. These factors themselves run "substantially parallel" to the criteria that historically have been deemed relevant in determining whether to accept or decline jurisdiction under the Declaratory Judgment Act. *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 309 n. 3 (1st Cir. 1986). To the extent these factors were to apply in this case, they likewise support the district court's refusal to exercise jurisdiction.

A. The First *Colorado River/Moses H. Cone* Factor, Jurisdiction Over Real Property, is Irrelevant in This Case.

The first factor set forth in *Colorado River* is not an issue in this case because there is no issue of jurisdiction over real property. Thus, this factor is irrelevant and should not be given any consideration in the abstention

analysis. *Lumberman's Mut. Cas. v. Connecticut Bank & Trust*, 806 F.2d 411, 414 (2nd Cir. 1986).

B. Litigating This Dispute in Federal Court is No More Convenient Than Litigating This Dispute in State Court.

The second *Colorado River* factor weighs the convenience of the respective forums. *Colorado River*, 424 U.S. at 818. Petitioners are each located in England. (R II p. 105.) Respondents are each located in Dallas County, Texas. (R II pp. 105-06.) As a result, litigating this dispute in federal court in Houston, Texas would be no more convenient than litigating this dispute in state court in Houston, Texas. Accordingly, the convenience of the respective forums factor does not weigh in favor of the exercise of jurisdiction by the district court.

C. The Piecemeal Litigation Factor Weighs in Favor of Abstention.

The courts below properly concluded that resolving London Underwriters' claims in this case would not dispose of the state court proceeding and would result in piecemeal litigation. Accordingly, this factor weighs in favor of abstention.

D. Petitioners' Preemptive Filing of This Action Does Not Support the Exercise of Jurisdiction in the District Court.

The fourth *Colorado River* factor, the order in which jurisdiction was obtained, also favors abstention. The

mere fact that Petitioners' suit was on file first in no way compelled the district court to exercise its jurisdiction. In *Moses H. Cone*, this court made it clear that priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions. *Moses H. Cone*, 460 U.S. at 21. Here, while both this case and the state court action were in their early stages, the state court action had progressed slightly further at the time the stay was entered in that Petitioners had filed responsive pleadings in the state court action. Thus, this factor weighs in favor of abstention.

The district court's specific finding that Petitioners first-filed declaratory judgment was filed in anticipation of litigation by Respondents and in an attempt to forum shop further supports the district court's decision not to exercise jurisdiction in this case. *See, Moses H. Cone*, 460 U.S. at 21 (finding that the party initiating the second-filed action had "no reasonable opportunity" to file its suit prior to the preemptive action); *Granite State Ins. Co. v. Tandy Corp.*, 762 F. Supp. 156, 160 (S.D.Tex. 1991), aff'd, 986 F.2d 94 (5th Cir. 1992), cert granted, 113 S. Ct. 51 (1992), cert dism'd, 113 S. Ct. 1836 (1993).

E. There is No Significant Federal Interest in This Suit.

It is undisputed that state law governs resolution of this coverage dispute. When there is another suit pending in state court presenting the same issues, not governed by federal law, between the same parties, a district court's discretion to grant relief under the Declaratory Judgment

Act ordinarily should not be exercised. *Brillhart*, 316 U.S. at 495. The absence of an issue of federal law in this case strongly counsels in favor of the district court's decision to decline to exercise its jurisdiction.

F. Petitioners' Rights are Adequately Protected in the State Court Proceeding.

The district court specifically determined that Petitioners could assert their claims in this action as defenses or counterclaims in the state court proceeding. Thus, Petitioners' rights are adequately protected in the state court proceeding and this abstention factor likewise favors abstention.

Accordingly, even if the *Colorado River* and *Moses H. Cone* factors were applicable, which Respondents deny, the district court nevertheless properly declined to exercise its jurisdiction in this case. As a result, there is no conflict with the result in this case and any decision of this Court or with any decision of any other circuit, and Petitioners present no question that merits this Court's review.

III. Under Either A *De Novo* Or Abuse Of Discretion Standard, The District Court's Stay Order Was Proper.

Finally, Petitioners complain of the failure of the Fifth Circuit to review the district court's decision to stay under an abuse of discretion standard rather than by *de novo* review. As applied to this case, which standard applies is irrelevant since the stay order would have been upheld regardless of the standard of review used.

This Court has already determined that a district court should not ordinarily exercise its discretion to hear declaratory judgment actions where there is another suit between the parties pending in state court that presents the same issues, not governed by federal law. *Brillhart*, 316 U.S. at 495. The rationale in *Brillhart* for allowing district courts broad discretion in determining whether to exercise jurisdiction in a declaratory judgment action had three principal bases: (1) avoidance of having federal courts needlessly determine issues of state law; (2) discouraging litigants from filing declaratory judgment actions as a means of forum shopping; and (3) avoiding duplicative litigation. *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1366-67 (9th Cir. 1991). Each of these three factors supports abstention here. First, there is no dispute that this insurance coverage dispute is governed by state law. Second, the district court correctly concluded that Petitioners brought this action in anticipation of litigation and that entertaining jurisdiction over this declaratory judgment action would reward Petitioners' attempts to forum shop. Finally, the courts below properly recognized that declining the exercise of jurisdiction in this case would avoid duplicative litigation. Review of these factors by *de novo* review rather than by an abuse of discretion standard would not change the result.

Petitioners are correct insofar as some circuits use *de novo* review rather than an abuse of discretion standard. In spite of the different standards, however, there is no practical difference in the result. The fact that the other circuits, regardless of the standard applied, would have affirmed the stay order is demonstrated by Petitioners' own authority. Five of the seven declaratory judgment

cases cited by Petitioners that review abstention *de novo* in declaratory judgment actions (Petition at 9-11) support Respondents' position, because in them the appellate courts ordered abstention. *Continental Cas. Co. v. Robsac Industries*, 947 F.2d 1367 (9th Cir. 1991); *Allstate Ins. v. Mercier*, 913 F.2d 273 (6th Cir. 1990); *International Harvester Co. v. Deere & Co.*, 623 F.2d 1207 (7th Cir. 1980); *Hanes Corp. v. Millard*, 531 F.2d 585 (D.C. Cir. 1976); *40235 Washington Street Corp. v. Lusardi*, 976 F.2d 587, 588-89 (9th Cir. 1992). In each of these cases other than *Lusardi*, the district court actually assumed jurisdiction over a declaratory judgment action and the appellate court reversed the district court's refusal to abstain.[5]

Only two of the declaratory judgment cases relied upon by Petitioners actually resulted in a determination that abstention was inappropriate. In both of those cases, however, the determination that abstention was improper hinged on factors not present here. In *Cincinnati Ins. Co. v. Holbrook*, 867 F.2d 1330, 1333 (11th Cir. 1989), abstention was held to be inappropriate because no adequate remedy was provided under state law in that state law would not have allowed resolution of a declaratory judgment action until the underlying claim had been resolved. Here, state law does provide an adequate remedy as evidenced by the district court's determination that Petitioners' rights would adequately be protected in the state court proceeding. Similarly, in *American Mfrs. Mut. Ins., Inc. v. Edward D. Stone, Jr. & Assoc.*, 743 F.2d 1519, 1524-25

[5] In *Lusardi*, the Ninth Circuit affirmed a district court's decision to abstain from exercising its jurisdiction in a declaratory judgment action.

(11th Cir. 1984), abstention was held to be inappropriate because the parallel state court action would not have resolved the issues pending in the federal action. No such consideration exists in this case.

Nonetheless, as a general principle, an abuse of discretion standard is appropriate for review of a district court's decision to abstain. *See infra* at § I. Petitioners' apparent contention that an abuse of discretion standard permits district courts "unfettered discretion" (Petition at p. 17) is misplaced. Broad discretion is not absolute discretion. In *Brillhart*, this Court counseled district courts to:

> . . . ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding in the state court . . . . The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.

Brillhart, 316 U.S. at 495. Similarly, in applying the rationale of *Brillhart*, the Fifth Circuit has formulated at least six nonexclusive factors which may be considered by a district court in determining whether abstention in a declaratory judgment action is appropriate. *See, Travelers Ins. Co. v. Louisiana Farm Bureau Federation, Inc.*, 996 F.2d 774, 778-79 (5th Cir. 1993).[6] Thus, there simply is no basis

[6] Petitioners complain that the six factor test formulated by the Fifth Circuit does not incorporate three *Colorado River/Moses*

for concluding that review under an abuse of discretion standard on appeal equates to providing a district court with unfettered discretion to refuse to exercise jurisdiction in a declaratory judgment action.

CONCLUSION

The consequences of Petitioners' argument in this case is that if an insurance company decides to shop for what it perceives to be a more advantageous forum, it can do so by racing to a federal courthouse with a declaratory judgment action which presents no issue of federal law for the district court's determination. Regardless of the degree of bad faith in which that action is brought, the district court would have little or no discretion over whether to hear it in the face of a parallel state court proceeding instituted by an insured. Thus, the natural consequence of requiring a district court to exercise its jurisdiction over a preemptive declaratory judgment

H. Cone factors: (1) jurisdiction over real property; (2) the applicability of federal law; and (3) precedence of filing. Petition at p. 17, n. 18. As discussed previously, the first two factors are not applicable in this case and the third factor actually supports abstention in light of the district court's determination that this action was filed in anticipation of litigation and as a means of forum shopping. *See infra* at § II. Moreover, in arguing that the Fifth Circuit erred in failing to apply these three *Colorado River/ Moses H. Cone* factors, none of which weighs in favor of the district court's exercise of jurisdiction, Petitioners have implicitly acknowledged that, even if the courts below had expressly applied the exceptional circumstances test, abstention nevertheless would have been required.

action such as the one at issue in this case would be to promote, not avoid, duplicative litigation.

This Court in *Brillhart*, has already determined that, in this situation, a district court should not exercise jurisdiction over a declaratory judgment action. Such a result is especially appropriate in this case in light of the district court's express determinations that this suit was filed as a means of forum shopping, that Petitioners' rights would be adequately protected in the state court proceeding and that declining jurisdiction would avoid duplicative litigation. Thus, in exercising its discretion, the district court properly stayed this action in deference to the state court action. In reviewing the action of the district court, regardless of the standard of review applied, the result is the same. The district court acted properly.

For these reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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